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The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses

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THE DOCTRINE OF ACCOMMODATION IN THE JURISPRUDENCE OF THE RELIGION CLAUSES

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INTRODUCTION

The religion clauses of the first amendment read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] Ratified in 1791, the clauses were presumed to be a cohesive and harmonious protection of religious liberty.[2] For almost a century after the clauses were appended to the Constitution, they excited relatively little controversy.[3] In the twentieth century, however, there has been an explosion of litigation challenging various state actions as violating the establishment clause, the free exercise clause, or both.

This growth in religion clause litigation has resulted in a corresponding expansion in establishment and free exercise jurisprudence.[4] The complexities

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1. U.S. CONST. amend. 1.

2. The religion clauses were supported by a union of both rationalists and pietists. Rationalists, such as Thomas Jefferson and James Madison, sought protection for government from what they claimed were the corrupting and largely irrational influences of religion. Pietists, on the other hand, wished to shield their religious communities from the depredations of government. Each group believed that the religion clauses together created a cohesive and internally consistent system of religious liberty. Mead, *American Protestantism During the Revolutionary Epoch*, in RELIGION IN AMERICAN HISTORY: INTERPRETIVE ESSAYS 165-66 (J. Mulder & J. Wilson eds. 1978). *See also* M. HOWE, THE GARDEN AND THE WILDERNESS 5-15 (1965) (Supreme Court has misinterpreted religion clauses by disregarding theological roots of American principles of separation); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-2 to -3, at 1154-66 (1988) (providing in-depth anaylysis as well as history of religion clauses); *infra* notes 20-22, and 95.

3. Permoli v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 589 (1845) is the only major case involving the religion clauses prior to the Mormon polygamy cases of the late 1870's and 1880's. *Permoli* involved a city ordinance prohibiting transportation of corpses to any Catholic church for the celebration of funerals. The Court applied the rule of Barron v. The Mayor & City of Baltimore, 32 U.S. (7 Pet.) 243 (1833), which held that the free exercise clause did not apply to state governments, and concluded that the city ordinance did not violate the free exercise clause, because the clause was directed exclusively at federal actions.

4. Compilation of a two-volume casebook by Hon. Arlin M. Adams and Charles Emmerich, former Director of the Center for Church State Studies at DePaul University, funded in part by the University of Pennsylvania and to be published by the University of Pennsylvania Press, is currently in the final stages prior to publication. The casebook is expected to be published sometime in 1989.

and inconsistencies of the law relating to the clauses prompted Chief Justice Rehnquist to lament recently that they have become a kind of Scylla and Charybdis,[5] evoking images of Ulysses' perilous journey through the Straits of Messina. This image suggests that if the monster of establishment clause doctrine does not trap the unwary sailor, the whirlpool of free exercise will.

In comparing the jurisprudence of the clauses to Scylla and Charybdis, the Chief Justice criticizes much of the Supreme Court's doctrine, which has given a broad reading to both the establishment and the free exercise clauses.[6] He maintains that each clause should be given a more narrow interpretation, so that neither will overwhelm the navigator.[7] It would perhaps be more appropriate to draw an analogy between the establishment and free exercise clauses and twin beacons, designed to protect and preserve both government and religion. These protections should not be mutually exclusive, and should allow for neutral territory between the two poles. Sailors should be able to plot a safe passage between the twin points of establishment and free exercise.

It is the width and depth of this passage that we address here. Commonly known as the "permissible zone of accommodation" of religion, the space between the clauses allows government *voluntarily* to accommodate the religious beliefs of citizens. An accommodation, therefore, respects the religious pluralism of the American people, without undermining the concept of anti-establishment. The zone between the two clauses has been the subject of considerable commentary and controversy.[8] This article is one more attempt to enter this formidable area.

I. The Concept of Permissible Accommodation

The Supreme Court has long recognized that a permissible "zone of accommodation" exists in the gray area between governmental actions that

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5. Thomas v. Review Bd., 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting) ("By broadly construing both Clauses, the Court has constantly narrowed the channel . . . through which any state or federal action must pass in order to survive constitutional scrutiny.").

6. Included in the critique are free exercise cases such as Sherbert v. Verner, 374 U.S. 398 (1963), and Thomas v. Review Bd., 450 U.S. 707 (1981), both of which mandated state unemployment benefits for religious individuals who refused to work at certain times or on certain products because of their faith. On the establishment side, reference is made to cases involving aid to parochial schools, such as Lemon v. Kurtzman, 403 U.S. 602 (1973), and Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973). The charge is that these cases were decided incorrectly on the basis of an "overly expansive" interpretation of the establishment clause. 450 U.S. at 721-25.

7. 450 U.S. at 726-27.

8. Included among the many works that deal with accommodation doctrine are *Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673 (1980); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381 (1967); Kurland, *Of Church and State and the Supreme Court*, 29 U. Chi L. Rev. 1 (1961); McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1; Oaks, *Separation, Accommodation and the Future of Church and State*, 35 De Paul L. Rev. 1 (1985); Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 Yale L.J. 692 (1968); L. Tribe, *supra* note 2, § 14-4, at 1166; Note, *Permissible Accommodations of Religion: Reconsidering the New York Get Statute*, 96 Yale L.J. 1147 (1987) [hereinafter Note, *New York Get Statute*].

violate the establishment clause and individual religious rights protected by the free exercise clause. In *Zorach v. Clauson,*[9] written by Justice Douglas in 1952, the Supreme Court upheld a released-time program that permitted public school children to be dismissed from class in order to receive religious instruction at parochial schools and churches. The Court reasoned that the arrangement did not violate the establishment clause, because it accommodated rather than advanced religious interests.[10] Actions that fall within the zone of permissible accommodation adjust governmental regulations to the religious needs of citizens, Justice Douglas reasoned, without transgressing the prohibitions of the establishment clause.

"Permissible accommodation" may thus be defined as an area of allowable governmental deference to the religious requirements of a pluralistic society in which a variety of religious beliefs are deeply held. This kind of *voluntary* accommodation should not be confused with the judicial or scholarly references to accommodation *required* by the free exercise clause. When Chief Justice Burger spoke in *Lynch v. Donnelly*[11] of the affirmative mandate to accommodate imposed on government by the free exercise guarantee,[12] he was not discussing permissible accommodation but rather mandatory accommodation. The former Chief Justice was referring to the principle that if a free exercise right is determined to have been infringed, government *must* accommodate the right, unless a compelling and narrowly tailored state interest justifies the infringement. This kind of court-ordered accommodation is an implementation of the free exercise clause and should not be equated with the voluntary accommodation to which this article is addressed.

Also distinguishable from the permissible accommodation analyzed in this article is governmental action that violates the establishment clause, often referred to as "forbidden" or "impermissible" accommodation.[13] Forbidden accommodation is in fact a term describing governmental action that has gone beyond the bounds of allowable deference to religious expression and belief, to actual endorsement of a particular religion. Forbidden accommodation is a wolf in sheep's clothing, as it were, since it is a term used to describe an establishment masquerading as an accommodation. Thus, impermissible accommodation is something of a contradiction in terms, because it infringes on the citizenry's right to a government that adheres to the nonestablishment principle.

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9. 343 U.S. 306 (1952).

10. *Id.* at 314-15.

11. 465 U.S. 668 (1984), *reh'g denied*, 466 U.S. 994 (1984).

12. 465 U.S. at 673.

13. *See, e.g.*, Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710-11 (1985) (statute that singled out Sabbath observers for accommodation violated establishment clause); Abington School Dist. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) (courts must draw line between "permissible and impermissible" accommodations to accord with history and reflect understanding of Founding Fathers).

The *Zorach* decision was immediately controversial, especially because four years earlier the Court had struck down a similar program.[14] But the more enduring controversy arising from *Zorach* has been over the meaning and wisdom of the newly-discovered accommodation doctrine. In the period since *Zorach,* judges and commentators have proposed various theories for defining and applying the doctrine of accommodation.

For most of its history, the accommodation theory has been a favorite of moderates. In using the term moderates, we mean those who believe that, while religion plays a vital role in American life and should not be burdened by excessive governmental intrusion, the establishment clause must be enforced vigilantly to protect both religious and political liberties. Recently, however, some commentators have argued that the doctrine should be expanded beyond its traditionally narrow scope.[15] According to such arguments, almost any governmental action taken to accommodate religious interests would pass muster under the establishment clause. As at least one scholar acknowledges, accommodation in this light would mean a weakening of both religion clauses.[16] Such an approach, we would argue, might increase the accommodation of mainstream religions, but could compromise the rights of minority religions and add dramatically to the government's involvement in religious affairs.

We believe that neither the history of the religion clauses nor the case law that has developed around these clauses supports this position. When prop-

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14. In Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948), the Court invalidated an Illinois school district's policy of allowing religious instructors to conduct classes during the school day on public school grounds. Although the school district did not pay the teachers, Justice Black, writing for a majority that included Justice Douglas, stated that:

> [N]ot only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.

Id. at 212.

Justices Black, Jackson and Frankfurter, dissenting separately in *Zorach,* argued that there was no meaningful distinction between the programs involved in the two cases. Justice Jackson was especially outraged by the seeming contradictions between *McCollum* and *Zorach*. He stated:

> The distinction attempted between [*McCollum*] and this [case] is trivial, almost to the point of cynicism, magnifying its nonessential details and disparaging compulsion which was the underlying reason for invalidity. A reading of the Court's opinion in that case along with its opinion in this case will show such difference of overtones and undertones as to make clear that the *McCollum* case has passed like a storm in a teacup. The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected. Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law.

343 U.S. at 325 (Jackson, J., dissenting).

15. *See infra* notes 96-103 and accompanying text.

16. *See infra* note 101 and accompanying text.

erly applied, the accommodation doctrine is a helpful analytical tool that resolves much of the tension between the two clauses. By steering a middle course between overly strict application of either the establishment or the free exercise clause, accommodation theory plays an essential role in the continued vitality of both. The concept of accommodation must itself be circumscribed carefully, however, or it will lose the quality of moderation that is its strength.

Accommodation, therefore, demands a careful balance between anti-establishment and free exercise principles. To allow accommodation to undermine the notion of separation of church and state would be to abandon a fundamental aspect of the non-establishment mandate. At the other extreme, voluntary accommodation by government generally focuses only on the most populous and visible religious groups. Religious minorities that currently are protected by the free exercise clause most likely would be overlooked if their rights were entrusted to the legislatures of state or federal governments. If accommodation is allowed to expand into the area protected by the free exercise clause, the rights of small minority groups will be prey to the "tyranny of the majority." Pushed to either extreme, accommodation would undermine core principles of the religion clauses.

To avoid the dangers of an overly expansive definition of accommodation, we propose that accommodation be limited to those situations in which the danger of establishment is remote. Further, like the free exercise mandate, the accommodation doctrine should be applied where there is a need to relieve a burden on religious conduct which is imposed by government. But accommodation must not be confused with free exercise; not all burdens on religion entitle a religious believer to constitutionally compelled relief. Accommodation should be reserved for religious practices that do not mandate free exercise relief. When a compelling state interest justifies a burden on religious exercise, or where the infringement is so incidental and remote that an exemption is outweighed by the need for uniformity, accommodation is appropriate.

In analyzing a challenged governmental action, a court should determine first whether the action removes a burden on religion that has been imposed by government rather than by social, economic, or other non-governmental forces. If so, the accommodation does not violate the establishment clause. Second, a court should determine whether the governmentally-imposed burden would entitle the plaintiff to relief under the free exercise clause. If so, the removal of the burden is in reality an interpretation of the scope and requirements of the free exercise clause, rather than a truly voluntary accommodation. By contrast, if the burden does not rise to the level of a violation of free exercise rights, then the removal of the burden is a genuine accommodation.

Our proposed test, then, involves the identification of two basic components:

(1) a governmentally-imposed burden on religious exercise, which
(2) does not entitle the believer to constitutionally-compelled relief.

This test preserves intact the non-establishment and free exercise guarantees, and provides for a significant area of governmental accommodation of religion. Although no single standard can anticipate the many potential situations that arise in the course of constitutional litigation, we are persuaded that this proposal strikes a useful balance between the two clauses.

II. Original Understanding and the Conflict Between the Religion Clauses

As drafted in 1791, both the establishment and free exercise clauses were designed to have a narrow scope. The dramatic expansion of the federal government, and the application of the religion clauses to the states through incorporation by the fourteenth amendment, have combined to extend the reach of the clauses into areas not contemplated by the Drafters or by the ratifying states.

A. The Original Application of the Religion Clauses[17]

Recent scholarship has disclosed that the congressional debates on the wording of the religion clauses were not directed toward *complete* separation of religion and government. Rather, the clauses were designed to limit the power of the federal government (rather than the state governments) to declare a particular faith the official religion of the United States. The Framers wanted to insure that government would not enforce the dogma of an officially-endorsed religion, thereby encroaching on the freedom of dissenters to hold and practice their own beliefs.[18] This intent is illustrated by a proposed amendment submitted by James Madison, which read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[19]

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17. Jefferson Powell, in a brilliant examination of the validity of using the "original intent" of the Framers as a guide to constitutional interpretation, stated that the intent of the Framers "was that the Constitution, like any other legal document, would be interpreted in accord with its express language." Powell, *The Original Understanding of Original Intent,* 98 Harv. L. Rev. 885, 903 (1985). In this light, the meaning of the words used in the document, rather than the content of debates surrounding adoption of a particular provision, would be the primary guide to constitutional interpretation, together with "the usual judicial process of case-by-case interpretation." *Id.* at 904.

Professor Powell's historical investigation calls into question the view that constitutional cases should be decided by reference to the "original intent" of the Framers. According to Powell, the use of "original intent" to decide cases involving constitutional provisions may violate to some extent the very intent at the drafting of the Constitution.

18. The pathbreaking legal history of Mark DeWolfe Howe revealed that the protection of religious organizations from governmentally-imposed orthodoxy, as well as the protection of government from the encroachments of established religion, were prime factors in the move to draft and enact the religion clauses. M. Howe, *supra* note 2, at 1-32. *See also infra* note 95.

19. Wallace v. Jaffree, 472 U.S. 38, 94 (1985) (Rehnquist, J., dissenting) (citing 1 Annals of Congress at 434).

Madison explained the meaning of the proposal as providing "that Congress should not establish a religion, and enforce the legal observation of it by law."[20] State representatives did not wish to "abolish religion altogether," but instead wanted to preclude the imposition of a federal religion on the states.[21]

The wording eventually adopted makes clear the exclusively federal application of the religion clauses. "Congress" alone is prohibited from establishing a religion and interfering with the free exercise of religion. The history of state-established religions, not addressed in the amendment, as well as the plain language of the amendment, make it apparent that the constraints imposed by the clauses applied only to the federal government. State actions were in no way affected by the first amendment.

Religious establishments in the states were common until the early nineteenth century. Massachusetts, Connecticut and Maryland, to name but three of the original thirteen states, legislated varying degrees of governmental support for particular religious denominations.[22] South Carolina established "the Christian Protestant religion," without preferring one denomination over another.[23] Significantly, in a few cases these state establishments continued well into the nineteenth century. For example, Massachusetts' establishment of the Congregational Church endured until 1833.[24]

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20. *Id.* at 95 (citing 1 ANNALS OF CONGRESS at 730).

21. *Id.* (citing 1 ANNALS OF CONGRESS at 729).

22. As adopted in 1780, Article III of the Massachusetts Constitution provided:

> As the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion, and morality . . . the legislature shall . . . require, the several towns, parishes, precincts, and other bodies-politic or religious societies to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of Protestant teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily.

5 W. SWINDLER, SOURCES AND DOCUMENTS OF THE U.S. CONSTITUTIONS 93 (1975) [hereinafter SOURCES AND DOCUMENTS].

Connecticut, which delayed adopting a formal constitution well into the nineteenth century, preferred instead to retain its 1662 charter, which provided for a religious as well as civil government of the colony. 2 SOURCES AND DOCUMENTS at 134. The Constitution of 1818, the first formal state constitution, disestablished the Congregational Church, providing that "No preference shall be given by law to any Christian sect or mode of worship." Art. I, § 4, *reprinted in id.* at 145.

Article 33 of the Maryland Constitution of 1776 provided that "the Legislature may, in their discretion, lay a general and equal tax, for the support of the Christian religion. . . ." 4 SOURCES AND DOCUMENTS at 374. The Constitution was amended in 1810 by Article 13, which stated that "it shall not be lawful for the general assembly of this State to lay an equal and general tax, or any other tax, on the people of this State, for the support of any religion." *Id.* at 387.

23. Article 38 of the South Carolina Constitution of 1778 provided: "The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State." 8 SOURCES AND DOCUMENTS at 474. This article was repealed implicitly by Article 8 of the 1790 Constitution, which declared that free exercise would be protected "without discrimination or preference." *Id.* at 480.

24. The disestablishment movement in Massachusetts was led, surprisingly enough, by

The desire of the states that ratified the Constitution was not that all government be separated forcibly from all religion, but that the federal government be expressly confined in the exercise of its power. Although Madison and several other Framers argued that the Constitution created a federal government of such limited powers that no additional protection for religious liberty was necessary, by 1789 five of the eleven colonies that had ratified the Constitution insisted that explicit protection for civil liberties should be appended to the original text.[25] Indeed, Rhode Island and North Carolina conditioned their ratification on the inclusion of a Bill of Rights.[26]

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conservative members of the established Congregational Church. By the early nineteenth century, notions of original sin and predestination, so central to pre-Revolutionary Congregationalism, seemed backward-looking to educated mercantile Bostonians. These prosperous city-dwellers were attracted by the Enlightenment emphasis on natural morality and reason, and rejected the harsh theology of earlier religious leaders. The liberals of eastern Massachusetts, seeking to escape the strictures of orthodoxy, evolved a Unitarian theology, based on orderly "self-evident truths" of the Trinity. *See generally* S. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 390-94 (1972) (providing historical survey of emergence of Unitarian liberalism).

The split between this liberal faction and the adherents of orthodoxy became open and bitter soon after the turn of the century. By 1820, the schism was final—Harvard was openly Unitarian, and conservatives in Dedham were outraged when the majority of the parish called a liberal Unitarian their minister. In the resulting lawsuit, Baker v. Fales, 16 Mass. 488 (1830), the Massachusetts Supreme Judicial Court held that Article III of the 1780 state constitution, which taxed all landowners not members of any other church to support the Congregational Church, entitled all taxpayers who contributed to the support of the parish to vote in the election of the minister. Chief Justice Parker, himself a Unitarian, wrote for the court, stating that the decision was not one of theology, but rather of property rights, since those taxed were thereby privileged to vote. 16 Mass. at 502-03. *See generally* M. HOWE, *supra* note 2 at 12-32.

Angry conservatives quickly joined with Baptists, Presbyterians, Methodists, and other religious minorities in calling for disestablishment. Article III was amended in 1833 to recognize simply that "the public worship of God, and instructions in piety, religion, and morality, promote the happiness and prosperity of a people, and the security of a republican government." 5 SOURCES & DOCUMENTS at 113.

25. Wallace v. Jaffree, 472 U.S. 38, 93 (1985) (Rehnquist, J., dissenting) (citing 3 J. ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 659 (1891)). In his dissent in *Wallace*, Justice Rehnquist argues that James Madison, rather than Thomas Jefferson, may be a more appropriate source for understanding of the Framers' perspective, since Jefferson in fact was out of the country when the Bill of Rights was passed by Congress. *Id.* at 92. He discusses the history of the enactment of the religion clauses in some detail, concluding that the Framers never intended to ban school prayer, or to be neutral between religion and non-religion.

> The Court strikes down the Alabama statute because the State wished to 'characterize prayer as a favored practice.' It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from 'endorsing' prayer. George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of 'public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.' History must judge whether it was the Father of his Country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause.

Wallace, 472 U.S. at 113 (Rehnquist, J., dissenting).

26. *Wallace*, 472 U.S. at 93 (Rehnquist, J., dissenting) (citing 1 J. ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 334 (1891)).

Memories of religious persecution in the "Old World," as well as the widespread resentment provoked before the Revolution by England's attempt to send an Anglican bishop to the colonies, lingered in the minds of state legislators. The concerns of the states did not result in a prohibition of establishment at home, however, although several states did take steps to protect the rights of religious dissenters.[27] Thus, a primary fear of many state leaders was that the federal government would interfere with state establishments, and perhaps even impose a national religion on the individual states.[28]

Moreover, as the Supreme Court recognized recently in *Marsh v. Chambers*,[29] a case involving the constitutionality of state legislative chaplains, the adoption of the religion clauses did not prompt the Framers to abandon all manner of religious observance. Indeed, the First Congress elected a chaplain to open each legislative session with a prayer, and "the practice of opening sessions with prayer has continued without interruption ever since."[30] The actions of the First Congress reveal that it believed it was bound to protect only against a "real threat" of religious establishment or infringement of religious liberty.[31] The arguably remote possibility of an eventual establishment resulting from the employment of legislative chaplains apparently did not present the potential for establishment that the Framers sought to prohibit in the religion clauses.[32]

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27. *See, e.g.* PA. CONST. of 1790, Art. IX, § 3 (1790):

> [A]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishments or modes of worship.

8 SOURCES & DOCUMENTS, *supra* note 21, at 292.

28. This understanding of the applicability of the religion clauses solely as a restraint on federal government was unquestioned throughout the eighteenth and nineteenth centuries. As Chief Justice Marshall explained in 1833:

> The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated.

Barron v. The Mayor and City of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833). *See also* Permoli v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 589 (1845) (applying doctrine of *Barron* to free exercise claim challenging city ordinance); *see supra* note 3.

29. 463 U.S. 783 (1983).

30. *Id.* at 788.

31. *Id.* at 791.

32. The danger posed by a legislative chaplaincy, as Justice Stevens noted in this dissent in *Marsh*, is that chaplains of mainstream denominations dominate legislative prayer sessions.

> Prayers may be said by a Catholic priest in the Massachusetts Legislature and by a Presbyterian minister in the Nebraska Legislature, but I would not expect to find a Jehovah's Witness or a disciple of Mary Baker Eddy or the Reverend Moon serving as the official chaplain in any state legislature.

463 U.S. at 823 (Stevens, J., dissenting).

B. *The Expansion of the Religion Clauses*

It may seem astonishing that the clauses now have such a wide application, given the popular understanding at the time of adoption that the religion clauses applied only to the federal government, and the understanding of the Drafters that all religious observance was not prohibited by the clauses. Today, the free exercise clause protects schoolchildren from mandatory flag salutes in state-run schools,[33] and it prohibits states from requiring oaths of office that include references to God.[34] The establishment clause now prohibits state-sponsored school prayers or Bible reading in coercive settings,[35] and the posting of the Ten Commandments on school walls.[36]

Two major developments in the legal and political landscape explain this expansion of the religion clauses. First, the activities of government—at both the state and federal levels—have increased dramatically in the twentieth century. Second, the "incorporation" of the religion clauses through the due process clause of the fourteenth amendment has extended the application of the religion clauses to the states. As a result of these two developments, an inherent tension between the two clauses has emerged.

1. *Increased Governmental Activity*

The rise of the welfare state in the mid-twentieth century has generated myriad new points of contact between government and individual citizens. The advent of such programs as Social Security, Aid to Families with Dependent Children and unemployment insurance all have contributed to increased governmental interaction with individual lives. Further, compulsory public education, largely operated by states but encouraged and supported financially by the federal government, also involves government in vital aspects of the day-to-day lives of many Americans.[37]

In an era of state and federal taxes on everything from income to fuel oil, we often forget that the reach of government into our pocketbooks and even into our privacy was at one time virtually negligible. For many of us, the religious significance of photographs on drivers licenses,[38] mandated

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33. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

34. Torcaso v. Watkins, 367 U.S. 488 (1961).

35. Abington School Dist. v. Shempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

36. Stone v. Graham, 449 U.S. 39 (1980), *reh'g denied*, 449 U.S. 1104 (1981).

37. For analyses of the role of compulsory public education in the development of the jurisprudence of the religion clauses, see Wallace v. Jaffree, 472 U.S. 38, 80-81 (1985) (O'Connor, J., concurring); McConnell, *supra* note 8, at 8-13.

38. *See* Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984) (state requirement of photograph to obtain driver's license violated plaintiff's free exercise rights), *aff'd by an equally divided Court sub nom.*, Jensen v. Quaring, 472 U.S. 478 (1985).

employment hours on Saturday,[39] or the payment of Social Security taxes,[40] may seem minimal. Yet to the adherents of a variety of religious beliefs, such governmental regulations invade areas of great religious significance. The free exercise clause, when invoked as a support for exemption from an otherwise neutral regulation or statute, may provide an exemption from the impact of an ostensibly neutral statute that would force religious believers to choose between violating religious beliefs or forfeiting the benefits of participating in governmentally-sponsored programs.

On the other side of the coin, increased governmental activity also runs the risk of involving government with religion in a manner that places the government's imprimatur on certain religious practices. Mandatory prayer in public schools has long been held a governmental endorsement of certain religious beliefs or practices.[41] Some constitutional plaintiffs have even argued that the public schools have been so purged of any vestige of religion that secular humanism has been enshrined in its place.[42] Although the litigants making this argument initially were successful in the district courts, appellate tribunals have rejected their claims.[43] Furthermore, the Supreme Court recently rejected a similar "secular humanism" argument in *Edwards v. Aquillard.*[44] In *Aquillard,* the Court held that a Louisiana statute known as the Creationism Act, which forbade the teaching of evolution in public schools unless accompanied by the teaching of "creation science," violated the establishment clause. The Court agreed with the lower court's conclusion that the Act did not protect academic freedom but rather discredited "evolution by counterbalancing its teaching at every turn with the teaching" of religiously-based theories,[45] thus conveying a message of official endorsement of a particular religious perspective.

2. *Incorporation of the Religion Clauses*

Together with the vastly increased potential for conflicts between religious belief and government, the legal world has witnessed a similar expansion of

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39. *See* Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment compensation may not be denied to Seventh-Day Adventist whose religious beliefs prohibit working on Saturday).

40. *See* United States v. Lee, 455 U.S. 252 (1982) (Old Order Amish religious beliefs prohibiting payment or receipt of Social Security taxes outweighed by compelling governmental interest in uniform administration of Social Security system).

41. *See* Engel v. Vitale, 370 U.S. 421 (1962) (state may not compose official state prayer and require its recitation in public schools).

42. *See* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987); Smith v. Board of School Comm'rs of Mobile County, 827 F.2d 684 (11th Cir. 1987).

43. *See, e.g.,* Smith v. Board of School Comm'rs of Mobile County, 655 F. Supp. 939 (S.D. Ala. 1987) (public school textbooks that omitted reference to significance of religion in American history violated establishment clause by enshrining religious values of secular humanism), *rev'd,* 827 F.2d 684 (11th Cir. 1987); Mozert v. Hawkins County Bd. of Educ., 647 F. Supp. 1194 (E.D. Tenn. 1986) (fundamentalist Christian schoolchildren have free exercise right to refrain from reading textbooks that violate their religious beliefs), *rev'd,* 827 F.2d 1058 (6th Cir. 1987).

44. 107 S. Ct. 2573 (1987).

45. *Id.* at 2580 (quoting Edwards v. Aquillard, 765 F.2d 1251, 1257 (5th Cir. 1985)).

constitutional jurisprudence. For the religion clauses, the watershed was reached in the mid-twentieth century when the clauses were held to be "incorporated" into the due process clause of the fourteenth amendment.

The post-Civil War amendments to the Constitution require that individual states guarantee the equal protection of the law and not abridge individual rights to life, liberty or property without due process of law.[46] The Supreme Court has interpreted the due process clause, which protects "liberty" in general, as embodying many of the limitations on government contained in the Bill of Rights. In two separate cases, *Cantwell v. Connecticut*[47] and *Everson v. Board of Education,*[48] the Supreme Court held that the free exercise and establishment clauses apply to the states as well as to the federal government.

As a result of incorporation, a flood of religion clause litigation ensued, eventually bringing to light an inherent conflict between the commands of the two provisions. The conflict is easily explained, although not easily resolved. Generally, the establishment clause prohibits the government from favoring one religion over another. If the government grants an exemption to a believer under the free exercise clause, while requiring all others to obey the law, the government effectively prefers the religion of that individual over the religion of those individuals who adhere to other religious beliefs, apparently in violation of the establishment clause.

The Supreme Court has recognized this tension between the clauses several times, although thus far it has not set forth a clear resolution of the conflict.[49] Generally, however, the Court and scholars have suggested that, while the clauses may be logically at odds if read as absolutely prohibiting preferential treatment among denominations and infringement of religious exercise, neither should be given such an absolute reading. As Chief Justice Burger acknowledged in a landmark case dealing with property tax exemptions for places used exclusively for religious worship, "[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are

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46. Section 1 of the fourteenth amendment reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

47. 310 U.S. 296 (1940) (incorporating free exercise clause).

48. 330 U.S. 1 (1947) (incorporating establishment clause).

49. *See, e.g.,* Thomas v. Review Bd., 450 U.S. 707, 719 (1981) (acknowledging "tension" between clauses); Sherbert v. Verner, 374 U.S. 398, 413-17 (1963) (Stewart, J., concurring) ("There are many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause.").

cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[50]

The apparent conflict between the religion clauses has prompted commentators to propose several possible solutions. Professor Kurland of the University of Chicago articulated a proposed resolution of the emerging conflict over 20 years ago. He argued that government should be entirely neutral with regard to religion. According to Kurland, "religion may not be used as a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations."[51] The neutrality theory, although certainly a means of resolving the discord, has been criticized as precluding all forms of religious exemptions. As Professor Giannella pointed out, the increase in the twentieth century of governmental regulations and social welfare programs has outmoded Kurland's argument.[52] Increased governmental activity inevitably produces the potential for infringement of religious beliefs, and the neutrality theory would not alleviate the heightened burden borne by believers.[53]

A second well-known approach would employ differing definitions of religion for each clause. Professor Tribe of Harvard University has contended that anything "arguably religious" should be protected by the free exercise clause, and that anything "arguably non-religious" does not violate the establishment clause.[54] Admittedly a means of resolving all conflicts in favor of the free exercise clause, Tribe maintains that such an approach is necessary in a country committed to religious equality and plurality.[55] However, his stance has been criticized as repugnant to the plain language of the clauses. The word "religion" is used only once in the first amendment, prohibiting the enactment of "laws respecting an establishment of religion, or prohibiting the free exercise thereof."[56] Superimposing alternate definitions of the same word for the two clauses would be inconsistent with the language of the amendment.[57]

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50. Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).

51. P. KURLAND, RELIGION AND THE LAW 18 (1962).

52. Giannella, *supra* note 8, at 1389-90.

53. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 82-83 (1985) (O'Connor, J., concurring) ("It is difficult to square any notion of 'complete neutrality' . . . with the mandate of the Free Exercise Clause that government must sometimes exempt a religious observer from an otherwise generally applicable obligation. A government that confers a benefit on an explicitly religious basis is not neutral toward religion."). *See also* Welsh v. United States, 398 U.S. 333, 372 (White, J., dissenting) (first amendment itself contains religious classification; therefore, absolute neutrality is impossible).

54. L. TRIBE, *supra* note 2, § 14-6, at 1183.

55. *Id.* § 14-8, at 1201 (free exercise clause should dominate in cases of conflict).

56. U.S. CONST. amend. I.

57. In Malnak v. Yogi, 592 F.2d 197, 211-12 (3d Cir. 1979) (Adams, J., concurring), Judge Adams rejected a dual-definition approach as contrary to both the language and the history of

Justice O'Connor recently addressed the tension between the clauses. In a concurring opinion in *Wallace v. Jaffree,* a decision invalidating Alabama's moment of silence statute, she stated that "[t]he solution to the conflict between the Religion Clauses lies not in 'neutrality,' but rather in identifying workable limits to the government's license to promote the free exercise of religion."[58] At least one Supreme Court Justice, therefore, indirectly has proposed ameliorating much of the tension between the clauses through use of the accommodation doctrine. It is in the "play in the joints" of the two clauses, to use the language of Chief Justice Burger in *Walz v. Tax Commission,*[59] that the accommodation theory finds its proper place, and that much of the tension may be eliminated. Before examining the boundaries of the so-called play-in-the-joints approach, we first review the history of accommodation.

III. The Evolution of Accommodation Theory

As noted earlier, the Supreme Court first articulated the permissible accommodation doctrine in the *Zorach v. Clauson*[60] decision. In *Zorach,* the Supreme Court upheld a released-time program for religious instruction of public schoolchildren, so long as the program was not on school property.

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the religion clauses:

> Despite the distinguished scholars who advocate [a dual-definition] approach, a stronger argument can be made for a unitary definition to prevail for both clauses. This would seem to be the preferable choice for several reasons. First, it is virtually required by the language of the first amendment . . . . [Further, a]lthough the Constitution has often been subject to a broad construction, it remains a written document. It is difficult to justify a reading of the first amendment so as to support a dual definition of religion, nor has our attention been drawn to any support for such a view in the conventional sources that have been thought to reveal the intention of the Framers.

Id. at 211-12 (Adams, J., concurring).

58. The definition of "state action" encompasses distinct concepts for purposes of the fourteenth and eleventh amendments. The eleventh amendment has been construed as embodying the doctrine of sovereign immunity; a state may not be sued without its consent. *See* Hans v. Louisiana, 134 U.S. 1 (1890). The Court, however, has created a distinction between suits against a state and suits against a state officer. *See Ex Parte* Young, 209 U.S. 123 (1908). Pursuant to the fourteenth amendment, an individual may bring an action against a state official provided the relief requested is prospective in nature. *Id.* Thus, an individual bringing suit in this posture is able to claim "state action" sufficient to invoke the protection of the fourteenth amendment, but does not trigger the prohibition of the eleventh amendment. *See* Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies about Federalism,* 89 Harv. L. Rev 682, 687 n.26 (1976).

However, a dual-definition of a term in the context of the religion clauses is more problematic. First, the text of the first amendment uses the term "religion" once, indicating Congress intended that a unitary definition should apply to both the establishment and free exercise clauses. *See Malnak,* 592 F.2d at 211. Second, the two religion clauses were not written a century apart, as were the fourteenth and eleventh amendments.

59. 397 U.S. at 669.

60. 343 U.S. 306 (1952).

Writing for the majority, Justice Douglas explained that invalidation of the arrangement would place the government in a position of actual hostility to religion.[61]

> Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.[62]

Such a position, the Court held, would be antithetical to the principles of the Constitution.[63] The Court stressed that government must be neutral in its treatment of different sects and may not prefer one group over another.[64] At the same time, government must not be hostile to religion. Each religious group must be allowed to succeed or fail on its own merits, without governmental interference. "We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."[65] This principle of voluntarism, however, does not mean that the government must ignore all manifestations of religious belief. As *Zorach* implied, respecting the religious nature of our people and accommodating religious beliefs are fundamental prerequisites of a pluralistic society.

Compulsion, according to *Zorach,* is equally at odds with constitutional values. Coerced religious exercise would violate basic principles of religious liberty. Accommodation of the desire to worship or to take religious instruction differs fundamentally from coercion. In such a situation, the Court stated, "[the government] can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction."[66] By so doing, government neither endorses nor inhibits religion, but rather follows what the Court called "our own prepossessions."[67]

As Justice Black argued in his dissent in *Zorach*,[68] and as a majority of the Court had stated five years earlier in *Everson v. Board of Education,*[69] the Constitution does not require a complete separation of church and state. According to the perspective of *Zorach,* the critical difference between sponsorship and accommodation is the compulsory or coercive nature of the government's actions. Accommodation stems from the principle of voluntarism and does not implicate even indirect compulsion. In *Zorach,* public

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61. 343 U.S. at 314.
62. *Id.*
63. *Id.* at 313.
64. *Id. See supra* note 49 and accompanying text.
65. 343 U.S. at 313.
66. *Id.* at 314.
67. *Id.* (citing Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 238 (1948)).
68. *Id.* at 318-19 (Black, J., dissenting).
69. 330 U.S. 1 (1947).

school grounds were not used for religious instruction, nor were students in any way required to attend sectarian classes. Thus, although the participating public schools certainly showed deference to the religious needs of schoolchildren by releasing them early to go to religious classes, there was no actual involvement by the school with the instruction itself. The schools were accommodating rather than promoting religion.

As Justice Jackson suggested in his dissent in *Zorach*, this distinction between accommodation and promotion or endorsement may seem metaphysical at times, yet the distinction is a vital one for constitutional analysis and furtherance of the individual's religious interests.[70] Without such a distinction, virtually all governmental actions that take cognizance of the religious pluralism of the American people would violate the establishment clause. Pressed to an extreme, this approach also would invalidate all exemptions granted for religious reasons, undermining religious freedom. At the same time, the precise limits of permissible accommodation were not defined in *Zorach,* and the theory remained a minor thread in the fabric of constitutional analysis until 1970.

In that year, the Supreme Court upheld property tax exemptions for religious as well as other charitable institutions. The Court, in *Walz v. Tax Commission,*[71] proclaimed that the granting of tax-exempt status is not sponsorship since the government does not transfer revenue to churches but Cimply abstains from demanding that they support the state.[72] The Court stated:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.'[73]

Moreover, *Walz* refined the concept of accommodation. Recognizing that there is a gray area between the two clauses, *Walz* stated explicitly that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the free exercise clause."[74] According to *Walz,* tax exemptions are accommodations that are analytically similar to the released-time program upheld in *Zorach.* Because state sponsorship of religious institutions is not inherent in a tax exemption, government may validly decide to refrain from requiring churches to support the state.[75]

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70. 343 U.S. at 325 (Jackson, J., dissenting).

71. 397 U.S. 664 (1970).

72. *Id.* at 675.

73. *Id.*

74. *Id.* at 673.

75. It could be argued that enforced taxation is potentially more problematic than exemption, since in that case churches in effect would be financing government, thereby entangling government in religious affairs:

> The hazards of churches supporting government are hardly less in their potential

Walz was the first decision that explicitly distinguished the doctrine of accommodation from free exercise requirements, stating that accommodation is not a synonym for free exercise:

> Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers. The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself.[76]

Instead, according to *Walz,* accommodation exists in the "play" between the two religion clauses.[77] Voluntary accommodations of religion—actions that fall between acts prohibited by the establishment clause and acts required by the free exercise clause—are a kind of "benevolent neutrality."[78]

Ironically, Justice Douglas, the author of *Zorach,* dissented in *Walz.*[79] Rather than viewing tax exemptions for religious organizations as a form of governmental abstention, Douglas characterized them as a subsidy forbidden by the non-establishment guarantee. Conceding that the dividing line between accommodation and sponsorship may not always be clear, Douglas nonetheless declared that *Walz* was a clear case, since "in common understanding one of the best ways to 'establish' one or more religions is to subsidize them, which a tax exemption does."[80]

The Supreme Court hinted in a conscientious objector case in the early 1970's that religious exemptions from military service may be another example of a permissible accommodation.[81] However, the next major case to deal with the concept of accommodation involved Title VII of the Civil Rights Act and the requirement that employers make "reasonable accommodations" to employees' religious needs.[82] In *Trans World Airlines v. Hardison,*[83] Justice White's majority opinion held that an employer was not required by the statute to incur more than a *de minimis* cost to satisfy the

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> than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation and separation. We cannot ignore the instances in history when church support of government led to the kind of involvement we seek to avoid.

Id. at 675 (footnote omitted).

76. *Id.* at 673.

77. *Id.* at 669.

78. *Id.*

79. 397 U.S. at 700 (Douglas, J., dissenting).

80. *Id.* at 701.

81. Gillette v. United States, 401 U.S. 437, 461 n.23 (1971) (noting that conscientous objector status is not mandated by the free exercise clause).

82. Under Title VII, a private employer may not discriminate on the basis of an employee's religion, "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (1982).

83. 432 U.S. 63 (1977).

reasonable accommodation requirement. Strictly speaking, *Hardison* was not a constitutional case, given that the challenge was based on the statutory language of Title VII rather than on constitutional accommodation theory. The decision suggests, however, that accommodation may not necessarily result in preferential treatment for an employee whose religion forbids work on Saturdays.[84] Such an arrangement, Justice White stated, would exceed the bounds of reasonableness, because, in that case, it would impose an undue burden on a private employer. Implicit in the *Hardison* holding is the notion that, to pass constitutional scrutiny, any statutory accommodation of religion must involve no more than minimal cost for the private accommodator.

Recently, several Supreme Court cases have further refined the notion of reasonable accommodation of an employee's sabbatarian practices. In *Estate of Thornton v. Caldor, Inc.*,[85] the Court invalidated a Connecticut statute that required all employers to allow employees to arrange their work week in a way that would not conflict with sabbatarian religious beliefs. In an eight-to-one opinion, the Court held that this requirement was a violation of the establishment clause. Far from being a reasonable accommodation, the blanket right to be excused from work, without regard to the hardship suffered by the employers or other employees, was a state-imposed burden on private employers to support religious worship.[86]

In *Ansonia Board of Education v. Philbrook*,[87] Chief Justice Rehnquist, writing for the Court, upheld an employer's policy that paid personal leave for religious observance be limited to three days per year. Because the Court determined that it was "reasonable" to structure the leave system to provide a maximum of three paid religious holidays, the majority held that it need not inquire whether another leave policy that may have accommodated the plaintiff's religious beliefs to a greater extent, might also have been reasonable. "By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet an accommodation obligation. . . . The employer need not further show that each of the employee's [proposed] alternative accommodations would result in undue hardship."[88]

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84. *Id.* at 84.

85. 472 U.S. 703 (1985).

86. *Id.* at 710 ("[U]nyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses," by requiring employers and fellow employees to support observance of Sabbatarians.).

87. 107 S. Ct. 367 (1986).

88. 107 S. Ct. at 372. Justice Marshall suggested in his dissent that the employer has a duty to consider an employee's proposal for accomodation where the confict is not "completely resolved" by the employer's solution. He stated that in *Philbrook* the conflict had not been fully resolved because the employee was forced to choose between following his religious precepts and losing wages, or violating those precepts in order to receive full pay. Justice Marshall stated that the employer had a duty under Title VII to consider further alternative proposals for accommodation if these steps could be taken without undue hardship. *Id.* at 374-75.

Most recently, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos,*[89] the Court upheld Title VII's exemption of religious employers from the provisions of the statute against an establishment clause challenge. Justice White's majority opinion held that the exemption was a valid accommodation of the interests of religious institutions. The Court noted that the exemption, which was extended in 1971 from covering only religious activities to apply to all non-profit activities of religious organizations, removed a significant burden from religious employers.[90] The Court determined that the fact that only religious, rather than all non-profit organizations are benefited by the exemption, did not violate the establishment clause. Removal of a regulatory burden on religious institutions need not "come packaged with benefits to secular entities" to pass constitutional muster as a permissible accommodation.[91]

Apparently, the Supreme Court is wary of requiring private employers under Title VII to adjust their practices to the religious beliefs of their employees. At the same time, however, government may validly exempt religious employers from compliance with Title VII requirements. In areas involving sabbatarian or other religious motivations for ceasing work, the Court repeatedly has held that the free exercise clause protects the right of individuals to claim unemployment insurance from the state.[92]

In the two most recent unemployment insurance cases, Chief Justice Rehnquist argued in dissents that the state should not be *required* to accommodate such religious choices, but instead should be allowed to do so *voluntarily*.[93] Maintaining that both the establishment and free exercise clauses have been read too broadly, he is persuaded that: "[w]here, as here, a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not in my view require the State to conform that statute to the dictates of religious conscience of any group."[94] "Conversely, governmental assistance which does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice does not impermissibly involve the government in religious choices and therefore does not violate the Establishment Clause . . . ."[95] From his viewpoint, the primary cause of the tension between the clauses is an erroneously expansive reading of the clauses, rather than an inherent conflict contained within them. Exemptions would be virtually nonexistent under the jurisprudence

89. 107 S. Ct. 2862 (1987).

90. *Id.* at 2868.

91. *Id.* at 2869.

92. *See, e.g.,* Hobbie v. Unemployment Appeals Comm'n, 107 S. Ct. 1046 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

93. *Hobbie,* 107 S. Ct. at 1052 (Rehnquist, C.J., dissenting); *Thomas,* 450 U.S. at 723 (Rehnquist, J., dissenting).

94. *Thomas,* 450 U.S. at 723 (Rehnquist, J., dissenting).

95. *Id.* at 727.

espoused by Chief Justice Rehnquist.[96] The establishment clause would be reduced to a prohibition only of direct inducement of belief. Accommodation, therefore, would be the rule rather than the exception, and apparent conflict between the clauses would disappear.

A number of legal scholars, most notably Professor McConnell of the University of Chicago, have proposed a similar approach. McConnell contends that an accommodation of religion that promotes "religious liberty" should be upheld.[97] Moreover, he argues that government should be permitted to remove socially-imposed burdens as well as governmentally-imposed burdens, and proposes a three-step analysis to distinguish between permissible accommodations and unwarranted benefits.[98] The primary question in analyzing a challenged accommodation of religion, according to McConnell, is whether the action accommodates an independently adopted religion, or whether the action induces religious belief in ways that further state interests.[99] Second, McConnell asks whether the accommodation interferes with the religious rights of others.[100] Finally, he would reject an accommodation that preferred one religious sect over another.[101] Some commentators have acknowledged that such an expansion of accommodation would substantially weaken the free exercise clause as well as the establishment clause. They

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96. Justice Harlan, dissenting in *Sherbert*, argued essentially the same point:

> It has been suggested that . . . singling out of religious conduct for special treatment may violate the constitutional limitations on state action. . . . My own view, however, is that at least under the circumstances of this case it would be a permissible accommodation of religion for the State, if it *chose* to do so, to create an exception to its eligibility requirements for persons like appellant. . . .
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> . . . [H]owever, I cannot subscribe to the conclusion that the State is constitutionally *compelled* to carve out an exception to its general rule of eligibility in the present case. Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between . . . .

374 U.S. at 422-23 (Harlan, J., dissenting) (citations omitted) (emphasis in original).

97. McConnell, *supra* note 8, at 34-35 ("The essential distinction [for constitutional analysis] is between permissible accommodations, which facilitate religious liberty, and unwarranted benefits, which constrain religious choice.").

98. McConnell states:

> Just as the government pursues "equal protection values" when it enacts laws prohibiting racial discrimination in private markets, so also it pursues "free exercise values" when it facilitates religious liberty in society at large. The "state action" limitation on constitutional rights does not logically imply any limit on government's power to extend statutory rights under its power to regulate commerce.

Id. at 32.

This approach, we believe, would unduly weaken the establishment clause. Virtually "[a]ny statute pertaining to religion can be viewed as an 'accommodation' of free exercise rights." *Amos*, 107 S. Ct. at 2874 (O'Connor, J., concurring) (quoting Wallace v. Jaffree, 472 U.S. 38, 82 (1985)). Further, unlike the equal protection analogy drawn by Professor McConnell, the free exercise clause is limited directly by its companion provision, the establishment clause. No such limitation circumscribes the advancement of "equal protection values."

99. McConnell, *supra* note 8, at 35.

100. *Id.* at 37.

101. *Id.* at 39.

argue that only if both clauses are curtailed sharply from current levels of enforcement can the government operate efficiently.[102]

We believe that such an approach goes too far. The history of the enactment of the religion clauses shows a concern for civil as well as religious liberties.[103] Although the clauses must be read with sufficient restraint to avoid unnecessary conflict between the two, the spirit of the first amendment demands continued vigilance to protect the religious and civil liberties of all citizens.[104] It is this principle of protection of religious and civil liberties, tempered by a due regard for the conviction of the Framers that they were designing a cohesive program for religious liberty, that should inform our interpretation of the theory of accommodation.

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102. *E.g.*, Oaks, *supra* note 8, at 4 ("[A]ccommodation represents a relaxation of both the non-establishment and free exercise commands of the religion clause.").

103. As Mark DeWolfe Howe and others have pointed out, the Supreme Court jurisprudence of the 1940's and 1950's inaccurately emphasized the "Jeffersonian" model of the religion clauses, overlooking completely the substantial influence of evangelical Protestantism in the enactment of the clauses. M. HOWE, *supra* note 2, at 1-36; Mead *supra* note 2, at 165-70. Cases, such as Everson v. Board of Educ., 330 U.S. 1 (1947), which, relying on a phrase first used by Jefferson, held that "[t]he First Amendment has erected a wall between church and state," *id.* at 18, stressed that "[t]he structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference." *Id.* at 15 (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 750 (1871)). As Justice Rehnquist pointed out in his dissent in Wallace v. Jaffree, 472 U.S. 38, 91-99 (1985) (Rehnquist, J., dissenting), exclusive reliance on the anti-clerical political philosophies of Thomas Jefferson, or even James Madison, may be misplaced. Perhaps because "American Protestantism has never developed any full-blown theoretical justification for its [advocacy of disestablishment]," S. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA 55-56 (1963), the rationalist justification for disestablishment long dominated Supreme Court analysis.

The recent scholarly and judicial focus on the religious motivation for disestablishment—the protection of "the garden in the wilderness"—has corrected much of the earlier gap in historical analysis. If anything, the pendulum now has swung too far in the other direction: the Supreme Court seems almost unwilling to concede any rationalist component of the religion clauses. In fact, the religion clauses were produced by a temporary union of rationalists and pietists, both of whom, despite fundamentally different reasons for doing so, agreed that religion is a matter of individual conscience, not properly subject to governmental interference or support. The union was not of long duration, however, primarily because disestablishment and free exercise protection removed the only reason for unification.

Thus, while it would be a mistake to emphasize the rationalist element at the expense of the evangelical influence, it is also incorrect to argue that the protection of religious liberty was the *only* motive for the enactment of the clauses. The rationalists were profoundly concerned that civil liberties be shielded from potential erosion by established religion.

104. As Justice O'Connor noted recently:

> Even if the Founding Fathers did not live in a society with the "broad range of benefits [and] complex programs" that the Federal Government administers today, . . . they constructed a society in which the Constitution placed express limits upon governmental actions limiting the freedoms of that society's members. The rise of the welfare state was not the fall of the Free Exercise Clause.

Bowen v. Roy, 106 S. Ct. 2147, 2169 (1986) (O'Connor, J., concurring in part and dissenting in part).

IV. The Role of Accommodation in Constitutional Jurisprudence

Of primary importance in any examination of the concept of accommodation is the recognition that the zone of permissible accommodation occupies the area *between* the two clauses. Accommodation thus touches both the establishment prohibition and the free exercise guarantee, without violating either. This recognition is a vital one, in that a valid accommodation, while it is not required by the free exercise clause, is nonetheless related to free exercise interests. Former Chief Justice Burger, after pointing out in *Walz* that accommodation is not limited by free exercise,[105] stopped short of providing any guidelines for determining the relationship between accommodation and free exercise.

In an insightful concurrence in *Wallace v. Jaffree,*[106] Justice O'Connor stated that the conflict between the religion clauses should be mediated through a properly defined accommodation doctrine. She further pointed out that the establishment and free exercise clauses are addressed to *governmental* action, rather than social or other non-governmental forces. Given this concern with state action, government validly may implement free exercise values by removing a governmentally-imposed burden on religion. A statute exempting religious individuals from an otherwise burdensome regulation, therefore, should be recognized as fulfilling the spirit of the free exercise clause and should not be held to abridge the establishment clause.[107]

> The solution to the conflict between the religion clauses lies not in "neutrality," but rather in identifying workable limits to the Government's license to promote the free exercise of religion. The text of the free exercise clause speaks of laws that prohibit the free exercise of religion. On its face, the clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues free exercise clause values when it lifts a governmentally-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard establishment clause test should be modified accordingly.[108]

Herein lies Justice O'Connor's resolution of the tension between the two clauses: If government voluntarily removes a burden it has placed on religion, that removal does not automatically violate the establishment clause. Thus, some accommodations are constitutional, but only those that remove governmentally-imposed burdens on religion.

This approach is consistent with earlier Supreme Court statements about accommodation. For example, in *Walz* the Court stressed that the state tax exemption of religious properties was not an unconstitutional establishment of religion, because the exemption removed a governmentally-imposed burden on religious institutions, rather than conferring a benefit. "We cannot

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105. *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970).

106. 472 U.S. 38, 67 (1985) (O'Connor, J., concurring).

107. *Id. See also supra* note 90, for an analysis of McConnell's critique of this limitation.

108. 472 U.S. at 84.

read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions."[109]

This accommodation analysis applies to the removal of burdens on religious exercise when the free exercise clause does not mandate granting an exception or invalidating a regulation. Thus, the doctrine of accommodation permits affirmative governmental actions to lessen a burden on a religious interest. The next question must be what comprises such a religious interest. In exploring the contours of the doctrine, we propose that a burden on a religious interest exists when government has required compliance with a regulation which offends the religious sensibilities of individuals or institutions, but which would not trigger a constitutional right to relief under the free exercise clause. If there is a compelling state interest in the regulation, or if the religious interest is so remote and tangential that the action does not rise to the level of an infringement, the free exercise clause does not mandate that government accommodate the belief. When government voluntarily chooses to alter its requirements to comport with such a religious interest, however, the accommodation would not violate the establishment clause. This broad definition of permissible accommodation is somewhat complex, but two examples may clarify its application.

An illustration of a religious interest in an exemption, as opposed to a free exercise right to exemption, is found in the draft cases involving conscientious objection to war. As the Supreme Court noted in *Gillette v. United States,* it is generally accepted that the Constitution does not mandate exemption from military service for conscientious objectors,[110] because one of the most compelling state interests is that of government in protecting its citizens and borders through military conscription. Although interpreting a statute rather than applying a full constitutional analysis, the caselaw implies that such an important interest in national security would outweigh individual religious objections to war.[111] Thus, there would be no free exercise right to exemption from the draft, because a compelling state interest justifies conscription. As Professor Giannella noted, the compelling state interest argument is bolstered further by the fact that a proposal to include an exemption for conscientious objectors was not adopted by the drafters of the first amendment.[112]

Yet it is clear that some religious groups sincerely oppose all use of force, even in self-defense. The religious interests of pacifists unquestionably are burdened by the requirement that they participate in armed conflict. The fact that the state has a compelling interest in its defense does not lessen

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109. 397 U.S. at 673.

110. 401 U.S. 437, 461 n.23 (1971).

111. *See, e.g.*, Welsh v. United States, 398 U.S. 333, 370 (1970) (White, J., dissenting) ("[T]his Court has more than once stated its unwillingness to construe the First Amendment, standing alone, as requiring draft exemptions for religious believers.").

112. Giannella, *supra* note 8, at 1411-12.

the heavy burden borne by groups like the Quakers, whose commitment to pacifism predates by more than a century the Revolution that created our country.[113] An accommodation of such a clear religious interest would not violate the establishment clause.[114]

A further example of voluntary accommodation in an area of compelling state interests is presented by the late Judge Leventhal's thoughtful concurrence in *Anderson v. Laird*.[115] In that case, the District of Columbia Circuit Court struck down regulations at Army, Navy and Air Force academies that required cadets to attend chapel on a weekly basis and prohibited them from changing their religious affiliation without permission. Concurring in the judgment, Judge Leventhal stressed that coerced worship undoubtedly violated basic constitutional principles, but, if the academies had made chapel services available without compelling attendance, their actions would not have transgressed the establishment clause. Judge Leventhal stated:

> [I]t is important to begin with the proposition which to me at least seems clear, that the Establishment Clause does not prohibit the Academies from providing property, facilities, and personnel in order to permit chapel and church attendance by cadets on a voluntary basis. In this voluntary context, the scope of the Establishment Clause is affected by the special position of the military and needs of its often isolated personnel, and such expenditures do not constitute an "excessive entanglement" with religion.[116]

Despite the fact that provision of chapels and chaplains involves an expenditure of governmental funds, the financial support of religion would not abridge the establishment clause because the academies in that event would be recognizing the special needs of military personnel, who often are isolated or restricted in their movements. In such situations, the availability of religious worship or spiritual counseling would accommodate beliefs that otherwise would be burdened by the exigencies of military service.[117]

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113. William Penn, in his essay "For of Light Came Sight," offered the following explanation of Quaker pacificism:

> Not fighting, but suffering is another testimony peculiar to [Quakers]. They affirm that Christianity teacheth people to beat their swords into plough-shares, and their spears into pruning hooks, and to learn war no more, that so the wolf may lie down with the lamb and the lion with the calf, and nothing that destroys be entertained in the hearts of people . . . .

Reprinted in THE QUAKER READER 106, 109 (J. West ed. 1962). *See also* E. RUSSELL, THE HISTORY OF QUAKERISM 46-58, 165-182 (1942).

114. Justice White seems to agree with this analysis of the conscientious objector cases. In a dissent in *Welsh*, he argued that Congress should be allowed to determine whether it would voluntarily exempt religious pacifists. Such an exception, he maintained, would not violate the establishment clause. 398 U.S. at 370-71.

115. 466 F.2d 283 (D.C. Cir. 1972), *cert. denied sub nom.*, Laird v. Anderson, 409 U.S. 1076 (1972).

116. *Id.* at 298 (Leventhal, J., concurring). For a thoughtful analysis of the constitutionality of the military chaplaincy as it is currently structured, see Note, *Military Mirrors on the Wall: Nonestablishment and the Military Chaplaincy*, 95 YALE L.J. 1210 (1986).

117. *Id.*

The recent decision *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*[118] made this approach even clearer. That case involved an establishment clause challenge to the congressional exemption of religious employers from Title VII's equal employment opportunity requirements. The Court upheld the statutory accommodation of the interests of religious institutions. Rejecting the argument that the exemption violates the establishment clause because it applies only to the religious activities of religious employers, rather than to a broad class of secular and religious non-profit activity, the Court held that "[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."[119] Thus, when government removes a regulatory—rather than a social or other non-governmentally-imposed—burden on a religious interest, even if the free exercise clause would not require an exemption, such a removal is a valid accommodation, and the establishment clause does not invalidate the action. Religious employers would not have a free exercise right to exemption, given the compelling interests served by Title VII. On the other hand, there can be no doubt that imposition of Title VII requirements on religious employers would impose a burden on their religious beliefs and practices. In such a situation, the establishment clause permits accommodation, although the free exercise clause does not mandate an exemption.

A third example of this first prong of our proposed test is found in *United States v. Lee*.[120] In that case, the Court found that the federal government's interest in uniform and predictable collection of Social Security taxes outweighed an Amish employer's religious objection to payment of the taxes.[121] Although not explicitly addressed by the Court, it is likely that a congressionally-enacted exemption for employers like Lee would be constitutional, given that there is a burden imposed on the Amish employer by the mandatory tax payment. The free exercise clause, while certainly relevant to the burden, does not provide a means of relief, because of the compelling interest in uniformity. Congress could, however, decide on its own that the value of accommodating religious dissenters outweighs its own interest in uniform collection.

The second broad category of permissible accommodations is illustrated by the Supreme Court's decision in *Bowen v. Roy*.[122] In *Bowen*, the Supreme Court upheld the regulation that a dependent recipient of Aid to Families with Dependent Children must have a social security number. The plaintiff, a Native American, claimed that his beliefs would be violated if his daughter's social security number was used by the government in its processing of

118. 107 S. Ct. 2862 (1987).
119. *Id.* at 2869.
120. 455 U.S. 252 (1982).
121. 455 U.S. at 258-59.
122. 106 S. Ct. 2147 (1986).

benefits. The plaintiff believed that the use of the social security number might impair his daughter's spirit. The Court recognized that the plaintiff's beliefs were sincere and could conceivably be affected adversely by the regulation. However, it concluded that the free exercise clause did not require an exemption, because the internal governmental procedures affected the plaintiff's religious beliefs only marginally. According to *Roy,* a plaintiff may not invoke the protection of the free exercise clause if governmental activity is exclusively internal, only incidentally affecting the interests of individual citizens. In other words, a religious individual does not have a free exercise right to restructure internal governmental procedures to conform with his or her religious beliefs. The infringement was *de minimis,* and mandatory adjustment of auditing mechanisms could well have imposed substantial costs.[123]

Thus, despite the plaintiff's genuine religious interest, he could not demand an exemption from the regulation, since to do so would require the government to restructure its own auditing mechanisms. The incidental effect of the requirement was a potential burden on a religious interest. Because the government's use of a social security number already in its possession affected religious exercise only tangentially, however, the burden was held to be only incidental and could be justified by the state's substantial interest in preventing fraud and administering benefits.[124] As in the draft and Title VII cases, voluntary exception from the social security number requirement to accommodate the plaintiff's beliefs would not violate the non-establishment mandate, since the burden on the belief was imposed by the regulation.

Most recently, the holding of *Bowen v. Roy* was extended to apply to a claim that proposed governmental development of public lands would destroy the practice of the site-specific religion of several local Native American tribes. In *Lyng v. Northwest Indian Cemetery Protective Association,*[125]

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123. *Id.* at 2155-56.

124. The case was a confusing one procedurally. The plaintiff, who argued originally that providing a social security number for his daughter would violate his religious beliefs, changed his position when it was revealed at the final day of trial that the government already possessed a social security number for the daughter, and had been using it in processing benefits for the plaintiff. After this revelation, the plaintiff changed his complaint to reflect a belief that the government's use of an already existing social security number would violate his beliefs. Justice Stevens believed that the case had been mooted by the discovery of the number's existence, but that, even if it was not moot, the case was not ripe, given that the trial had been based on the erroneous belief that no social security number had yet been obtained for the plaintiff's daughter. 106 S. Ct. at 2163-64 (Stevens, J., concurring).

Justice O'Connor, joined by Justices Marshall and Brennan, concurring in part and dissenting in part, maintained that there is a crucial difference between prohibiting government from using in a neutral and impartial way information already in its possession, and requiring a potential recipient to supply a social security number prior to receiving benefits. In the latter situation the traditional compelling state interest-least restrictive means test should be triggered, because in that situation government would be conditioning receipt of a benefit upon an infringement of free exercise rights. 106 S. Ct. at 2165 (O'Connor, J., concurring in part and dissenting in part).

125. 108 S. Ct. 1319 (1988).

Justice O'Connor, writing for a 5-3 majority, held that the government need not demonstrate a compelling interest in the construction of a logging road, despite the fact that "the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices."[126] The majority rejected the argument of the dissent that federal land-use decisions, unlike the internal recordkeeping processes at issue in *Roy*, have "substantial external effects,"[127] and have the potential "to destroy an entire religion."[128] The Court did stress, however, that a voluntary decision to forego construction in the area sacred to the local tribes would be a valid accommodation of what are indisputably vital religious interests: "Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents."[129]

Lyng is reminiscent of *Braunfeld v. Brown*.[130] In that case, the Supreme Court denied an orthodox Jewish merchant's claim that Sunday closing laws had violated his free exercise rights. The plaintiff maintained that the Sunday closing law put him at an unfair competitive disadvantage because he was required by his religious beliefs to keep his store closed on Saturday. Non-Jewish store owners captured much of his business on Saturday, and he was denied the opportunity to recoup his losses by staying open on Sunday.

The Court rejected this argument, holding that the state's interest in a uniform day of rest, the difficulty of administering exceptions, and a potential windfall for the exempted class all outweighed the economic burden borne by the plaintiff.[131] The Court intimated, however, that a state could exempt non-Sunday sabbatarian businesses from its Sunday closing laws without offending the establishment clause.[132] Later, the state of Kentucky did just that, and an appeal from the decision upholding the exemption was dismissed by the Supreme Court "for want of a substantial federal question."[133]

Although we would maintain that the free exercise clause analysis may well have been improperly denied applicability to Mr. Braunfeld's situation,[134] it is apparent that Kentucky's voluntary accommodation of such sabbatarian religious interests was constitutionally valid. Similarly, although we believe that the government should have been required to meet the standard com-

126. 108 S. Ct. at 1326.
127. *Id.* at 1336.
128. *Id.* at 1339.
129. *Id.* at 1328.
130. 366 U.S. 599 (1961).
131. *Id.* at 608-09.
132. *Id.* at 608.
133. Arlan's Dept. Store, Inc. v. Kentucky, 371 U.S. 218 (1962).
134. *But cf.* Note, *New York* Get *Statute, supra* note 8, at 1153-58 (arguing *Braunfeld* was correctly decided).

pelling state interest test for infringements of religious freedom in *Lyng*, it is unquestionable that a decision to accommodate the Native American religious interests would be constitutional.

In situations involving an exemption from a governmental burden, the threat of an establishment of religion is remote, precisely because government has acted to remove a burden placed on religion by one of its own regulations. That removal does not constitute a promotion or endorsement of religion. Significantly, an accommodation of a religious claim that was not designed to lift a governmentally-imposed burden would run a far higher risk of abridging the establishment clause. For example, a decision to turn over public lands to a religious group that wanted to build a church would be an impermissible establishment. This action results in a violation of the establishment clause because government would be conferring a benefit on the religion, rather than removing a disability.[135]

A final example highlights the importance of limiting accommodation to relieving burdens imposed by government, rather than burdens placed on religions by society at large. Government may have an interest in regulating when and where religious activity takes place. It may not, however, remove burdens imposed by the rough and tumble of society. If a particular religion, such as a group that believes in soliciting door-to-door and using aggressive and persistent proselytizing practices, provokes ridicule or peaceful demonstrations against such practices, it would be invalid for the state to seek to alleviate such a socially-imposed burden.[136] Quite apart from the free speech rights of demonstrators, the state may not interfere in independent religious or anti-religious choices that do not otherwise violate the law. Government, of course, could protect the group against violence or physical interference, but it could not undertake to ensure that group members would be immune from the indignities of demonstrations that express opposition to the group's beliefs. If the state were to remove a burden imposed by social forces, it would, in effect, be sponsoring that religion, thereby trespassing on the non-establishment mandate.

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135. Although the case ultimately was decided on standing grounds rather than on the merits, Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982), involved taxpayers' establishment clause challenge to the federal government's transfer of a former military hospital to a sectarian college. In essence, plaintiffs alleged that the government had given a substantial property award to one denomination, much like the hypothetical we use to illustrate an impermissible accommodation.

136. A series of landmark first amendment decisions, apparently based primarily on the speech clause rather than the free exercise clause, involved proselytizing activities similar to those described in the text. At issue in those cases was the judicial protection of the rights of the proselytizers themselves, rather than those of counter-demonstrators. *See, e.g.* Cantwell v. Connecticut, 310 U.S. 296 (1940) (reversing conviction for breach of peace based on record played by Jehovah's Witness); Schneider v. State, 308 U.S. 147 (1939) (invalidating anti-littering ordinance used to convict Jehovah's Witnesses who had distributed religious leaflets); Lovell v. Griffin, 303 U.S. 444 (1938) (invalidating municipal statute prohibiting distribution of literature without permit after Jehovah's Witness was convicted of violating ordinance while distributing religious literature).

In short, because the free exercise and establishment clauses are directed expressly at governmental action, the doctrine of accommodation, which exists in the interstices of the two clauses, must also be tied closely to governmental action. By restricting accommodation to instances of alleviating a burden imposed by government, the danger of vitiating the establishment clause is avoided. By limiting the doctrine of accommodation to cases in which a religious interest rather than a free exercise right is presented, the danger of reducing the free exercise clause to a matter of voluntary compliance is also avoided.

V. Conclusion

Accommodation is by its very nature a theory of the middle ground. By confining accommodation to the area between establishment and free exercise, the vitality of both clauses is maintained, and much of the tension that has grown up between them is thereby diminished. The test proposed here, while it may not resolve all issues of accommodation, provides broad guidelines for judges, legislators, and religious groups that must deal with governmental burdens on individual believers.